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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CESAR MAGSOMBOL et al.,

Plaintiffs and Appellants,

v.

AURORA LOAN SERVICES, LLC et al.,

Defendants and Respondents.

G046076

(Super. Ct. No. 30-2011-00452138)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Nick A. Alden for Plaintiffs and Appellants.

Akerman Senterfitt, Justin D. Balser, Imran Hayat and Preston K. Asherin
for Defendants and Respondents.

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Plaintiffs Cesar and Rosie Magsombol filed a complaint against Mortgage Electronic Registration Systems, Inc. (MERS), Aurora Loan Service, LLC, (Aurora; collectively, the defendants) erroneously sued as Aurora Loan Services Corporation, alleging causes of action for breach of contract, violation of statutory duties, unfair business practices, and quiet title. The superior court sustained defendants' demurrer to the first amended complaint without leave to amended. We affirm.

I

FACTS

According to the complaint and exhibits attached thereto, plaintiffs obtained a \$580,000 loan from Aegis Wholesale Corporation (AEGIS) in 2007, and signed a promissory note and a deed of trust on their property on Toulouse Drive in La Palma as security. The deed listed Commonwealth Land Title as trustee and MERS as beneficiary. The deed of trust stated "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." The deed further stated: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property"

On January 12, 2010, a notice of default and election to sell under the deed of trust was filed with the Orange County Recorder's Office by Quality Loan Service Corporation (Quality Loan Service). At the time of the notice, plaintiffs were \$11,323.38 in arrears. According to the notice of default, "[t]he beneficiary or its designated agent"

declared it complied with the notice requirements of Civil Code section 2923.5.¹ The declaration of compliance was signed by a representative of Quality Loan Service, as an agent for the beneficiary. On January 28, 2010, MERS substituted a new trustee, Quality Loan Service, in place of Commonwealth Land Title. The notice of trustee's sale, scheduled for September 22, 2010, was filed on August 31, 2010. The notice stated the amount of the unpaid balance on the loan and other charges amounted to \$660,351.44.

Plaintiffs' complaint alleged causes of action for breach of contract, violation of statutory duties, unfair business practice, and quiet title. Defendants demurred to the complaint and filed a motion to strike in conjunction with the demurrer. Plaintiffs responded by filing an amended complaint a week before the scheduled hearing on the demurrer and motion to strike.

Defendants thereafter filed a demurrer to the amended complaint, another motion to strike, and a motion to expunge the lis pendens filed by plaintiffs at the end of March 2011. Defendants also filed a request for the court to take judicial notice of the notice of default, the substitution of trustee, the notice of the trustee's sale, the beneficiary's declaration of compliance, the September 1, 2010 affidavit of mailing, and the August 3, 2007 notice of assignment, sale, or transfer of servicing rights.

The superior court ordered the lis pendens expunged and sustained defendants' demurrer without leave to amend, rendering moot the motion to strike plaintiffs' request for punitive damages. The case was subsequently dismissed. Judgment was entered after plaintiffs' filed their notice of appeal. We deem the premature notice of appeal timely filed. (Cal. Rules of Court, rule 8.108(d)(2).)

¹ A mortgagee, beneficiary, or authorized agent is required to contact the borrower or demonstrate due diligence to contact the borrower "in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." (Civ. Code, § 2923.5, subds. (a)(1), (2); all statutory references are to the Civil Code unless otherwise stated.)

II DISCUSSION

A. *Standard of Review*

A trial court's action sustaining a demurrer presents a pure question of law which we review de novo. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.) "[W]e treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions, or conclusions of law. [Citations.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer. [Citations.]" (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.) "We may also consider matters that have been judicially noticed. [Citations.]" (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

Additionally, when the court sustains a demurrer without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]" (*City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865.) Plaintiff, however, bears the burden of proving the complaint could be amended to cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. *The Trial Court Did Not Err in Sustaining Defendants' Demurrer*

California's comprehensive statutory nonjudicial foreclosure procedure is contained in Civil Code sections 2924 through 2924k. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154.) The statutory scheme covers "every aspect" of a sale under a deed of trust. (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285; *Gomes v. Countrywide Loans, Inc., supra*, 192 Cal.App.4th at p. 1154.)

“When the trustor defaults on the debt secured by the deed of trust, the beneficiary may declare a default and make a demand on the trustee to commence foreclosure.

[Citation.]” (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 334.)

The initial step required under the statutory scheme is for the “trustee, mortgagee, *or beneficiary, or any of their authorized agents*” to file a notice of default with the recorder of the county in which the property is located. (§ 2924, subd. (a)(1), *italics added.*) With an exception not applicable here, not less than three months after the filing of the notice of default, “the mortgagee, trustee, or other person authorized to take the sale shall give notice of sale, stating the time and place thereof” (§ 2924, subd. (a)(3).) The publication, posting, and mailed notice of sale must occur at least 20 days before the sale and notice of the sale must be recorded at least 14 days before the sale. (*Kachlon v. Markowitz, supra*, 168 Cal.App.4th at pp. 334-335; §§ 2924, subd. (a)(2), 2924f, subd. (b)(1).)

The notice of default and election to sell was filed on January 12, 2010. According to the notice, plaintiffs were \$11,323.38 in arrears at the time. The notice included the following statement: “[T]he undersigned is either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee *or beneficiary* under a Deed of Trust” executed by plaintiffs to secure the repayment of the loan made by AEGIS. (*Italics added.*) The notice of default was signed by an employee of Quality Loan Service, as “agent for beneficiary.” (*Boldface and capitalization omitted.*) MERS, the beneficiary under the deed of trust, was entitled to file the notice of default and election to sell under the deed of trust. (§ 2924, subd. (a)(1).)

“MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members’ interests to MERS. MERS is listed as the grantee in the official records maintained at county register of

deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.’ (*Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking & Finance* (2005) 270 Neb. 529, 530.) ‘A side effect of the MERS system is that a transfer of an interest in a mortgage loan between two MERS members is unknown to those outside the MERS system.’ (*Jackson v. Mortgage Electronic Registration Systems, Inc.* (Minn. 2009) 770 N.W.2d 487, 491.)” (*Gomes v. Countrywide Home Loans, Inc., supra*, 192 Cal.App.4th at p. 1151.)

The notice of default informed plaintiffs they could contact Aurora to arrange the payment necessary to stop the foreclosure. (§§ 2924, subd. (a)(1)(D), 2924c, subds. (a)(1), (b)(1).) The declaration of compliance with prefiling notice requirements (§ 2923.5, subd. (g)(3)) stated the required telephone calls were made to plaintiffs and a certified letter, return receipt requested, was sent to plaintiffs informing them of the default. The declaration was signed under Aurora’s letterhead and stated it was signed by the “beneficiary or authorized agent for the beneficiary.”

Sixteen days after filing of the notice of default and election to sell under the deed of trust, MERS substituted Quality Loan Service as trustee under the deed of trust. The substitution was filed with the county recorder on February 23, 2010. Notice of the scheduled trustee’s sale was filed by Quality Loan Service on August 31, 2010. (§ 2924, subdivision (a)(3) [notice of sale may not be filed earlier than three months after filing of the notice of default].) The notice of sale alleged the unpaid balance and other fees owed by plaintiffs totaled \$660,351.44. Apparently, no sale has yet taken place.

Plaintiffs contend the nonjudicial foreclosure procedure used in this matter was improper because Quality Loan Service was not the appointed trustee at the time it recorded the notice of default. Plaintiffs allege AEGIS was the beneficiary of the deed of

trust and, having gone out of business, Quality Loan Service could not have acted as AEGIS's agent. That argument fails because the notice of foreclosure was filed by Quality Loan Service, acting as the agent for the trustee or *beneficiary* under the deed of trust, and the beneficiary (MERS) or its authorized agent has the authority to file the notice of default. (§ 2924, subd. (a)(1).) Contrary to plaintiffs' assertion, MERS, not AEGIS was the beneficiary of the deed of trust. MERS's status as the beneficiary under the deed of trust is not reasonably subject to dispute. (*Fontenot v. Wells Fargo N.A.* (2011) 198 CalApp.4th 256, 266.)

Also contrary to plaintiffs' contention, Quality Loan Service did not assert it filed the notice of default as the agent of Aurora. When a default is curable, the notice of default and intention to sell must contain a statement of the amount necessary to cure the default. (§§ 2924, 2924c; *I.E. Associates v. Safeco Title Ins. Co.*, *supra*, 39 Cal.3d at p. 286.) The notice of default stated the amount plaintiffs were in arrears and informed plaintiffs they should contact Aurora to inquire as to the amount necessary to stop the foreclosure. The notice did not identify Aurora as the beneficiary of the deed of trust.

Plaintiffs' complaint also alleged MERS's substitution of trustee was ineffective because MERS could no longer act as AEGIS's agent once AEGIS went out of business.² In naming MERS the beneficiary, the deed of trust stated MERS acts as the nominee "for Lender *and Lender's successors and assigns.*" (Italics added.) Thus, while AEGIS stopped conducting business in California, MERS continued to represent any

² Plaintiffs have requested we take judicial notice of nine documents attached to their request. They contend the documents are relevant to show AEGIS was no longer conducting business when MERS filed the substitution of trustee in this matter. We grant the unopposed request to take judicial notice of the fact that AEGIS surrendered its right to conduct business in California on May 30, 2008. We also take judicial notice of the judicial decisions attached to plaintiffs' request. (Evid. Code, §§ 452, 459.) We deny the request as to the remaining documents as they are either cumulative or concern AEGIS's status in states other than California.

successor in interest or assign of AEGIS.³ Moreover, as MERS was named as the beneficiary of the deed of trust, it had the power to substitute trustees. The trustee under a deed of trust may be substituted by a substitution “executed and acknowledged by: (A) all of the beneficiaries under the trust deed, or their successors in interest” (§ 2934a, subd. (a)(1).)

The deed of trust contained a paragraph setting for the procedure for the substitution of trustee. Plaintiffs argue that paragraph refers to the lender substituting trustees and what the *lender* must do to effect a substitution. That provision does not mean MERS could not substitute a trustee. First, MERS acts as the nominee of the lender and its successors and assigns. Second, section 2934a authorizes the substitution of a trustee upon a substitution executed by the beneficiary under the deed of trust and that provision prevails, “notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968.” (§ 2934a, subd. (a)(1).) The substitution of trustee was executed and acknowledged by the vice-president of MERS, the only beneficiary under the deed of trust. Consequently, there was nothing improper in MERS substituting trustees. The requirements for a nonjudicial foreclosure were followed here.

1. *Breach of Contract*

Although the complaint contains stock language alleging plaintiffs performed all conditions, covenants, and promises required by the contract, a copy of the notice of default filed with the county recorder was attached to the complaint. According to the notice of default, plaintiffs were in default in the amount of \$11,323.38 as of January 12, 2010. We give precedence to the amount of the default set forth in the exhibit. (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1300.)

The complaint alleged the deed of trust was violated when Quality Loan Service recorded the notice of default *before* it had been appointed as trustee, not because

³ Plaintiffs do not allege AEGIS has no assigns or successors in interest.

plaintiffs were not in default. However, the beneficiary of the deed of trust has the power to file a notice of default (§ 2924, subd. (a)(1)) and the notice of default filed by Quality Loan Service expressly stated it was acting as the original trustee, the duly appointed substitute trustee, or acting as the agent for the trustee *or the beneficiary* under the deed of trust. MERS was the beneficiary under the deed of trust. Quality Loan Service did not, therefore, have to be substituted as trustee before it could file a notice of default. Accordingly, the complaint failed to state a cause of action for breach of contract.

2. Violation of Statutory Duties

The cause of action for violation of statutory duties, like the cause of action for breach of contract, is based on plaintiffs' assertion the notice of default and intent to sell under the deed of trust was improperly filed by Quality Loan Service at a time when it was not the appointed trustee. As the filing of the notice was proper (§ 2924, subd. (a)(1) [beneficiary or its agent may file notice of default]), it cannot serve as the basis of a cause of action for violating statutory duties.

The facts in this matter are remarkably similar to those presented in *Gomes v. Countrywide Home Loans, Inc.*, *supra*, 192 Cal.App.4th 1149. The deed of trust in the present case used language identical to that used in the *Gomes* deed of trust naming MERS as beneficiary. “Borrower . . . understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property” (*Id.* at p. 1151.) Plaintiffs and *Gomes* defaulted on their loans, were mailed notices of default, and instituted civil actions to contest the nonjudicial foreclosures. (*Id.* at pp. 1151-1152.)

Gomes, who had borrowed money from KB Home Mortgage Company and secured it with the deed of trust, alleged on information and belief the mortgage company sold the mortgage on the secondary mortgage market, and the person or entity that

authorized the foreclosure was not the holder of the note, i.e., MERS did not have authority to initiate foreclosure. (*Gomes v. Countrywide Home Loans, supra*, 192 Cal.App.4th at p. 1152.) Here, plaintiffs allege AEGIS went out of business and as a result, the agency AEGIS had with MERS terminated. Thus, the bottom line is the same: both *Gomes* and plaintiffs claimed MERS was without authority to initiate foreclosure. In both cases the trial court sustained the defendants' demurrer to the complaint. (*Id.* at p. 1153.)

In finding the trial court properly sustained the demurrer, the *Gomes* court noted, "By asserting a right to bring a court action to determine whether the owner of the Note has authorized its nominee to initiate the foreclosure process, *Gomes* is attempting to interject the courts into this comprehensive nonjudicial scheme." (*Gomes v. Countrywide Home Loans, supra*, 192 Cal.App.4th at p. 1154.) The court rejected the attempt. "[N]owhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action. [Citation.]" (*Id.* at p. 1155.) We agree.

Further, even assuming such an action may be brought in an appropriate case, there should a specific allegation setting forth reasonable cause to believe the nonjudicial foreclosure is not authorized in that case. Plaintiffs' assertion that AEGIS no longer conducts business in California is not sufficient. As in *Gomes*, plaintiff agreed in the deed of trust that MERS could initiate foreclosure. (*Gomes v. Countrywide Home Loans, supra*, 192 Cal.App.4th at p. 1157.) Having done so, plaintiff cannot complain MERS lacks the authority granted by the deed of trust. (*Id.* at p. 1158; accord *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1504-1505.) The deed of trust provision naming MERS as beneficiary stated MERS acts as the nominee not only of the lender, but also as the nominee of the lender's successors and assigns. Plaintiffs have not alleged any facts to the effect that MERS no longer holds that same position with AEGIS's successor(s) or assign(s). The notice of default and the notice of

trustee sale complied with the requirements of the Civil Code.

3. *Unfair Business Practices*

As the trial court noted, plaintiffs' cause of action for unfair business practices (Bus. & Prof. Code, § 17200 et seq.) is derivative of its first two claims and rises or falls with those causes of action. As we have found the foreclosure proceedings did not violate California law or the agreement with plaintiffs, plaintiffs failed to allege an unfair business practice.

4. *Quiet Title*

A complaint for quiet title must be verified (Code Civ. Proc., § 761.020) and allege a description of the property (Code Civ. Proc., § 761.020, subd. (a), the title of the plaintiff, the basis of the title (Code of Civ. Proc., § 761.020, subd. (b)), "[t]he adverse claims to the title of the plaintiff against which a determination is sought" (Code Civ. Proc., § 761.020, subd. (c)), the date as to which the determination is sought, the reason why that particular date was selected (Code Civ. Proc., § 761.020, subd. (d)), and a prayer for determination of the plaintiff's title against the adverse claim (Code Civ. Proc., § 761.020, subd. (e).) Plaintiffs' complaint fails to allege a cause of action because plaintiffs are inarguably the owners of the property. "The recorded foreclosure Notices do not affect Plaintiffs' title, ownership, or possession in the Property." (*Ortiz v. Accredited Home Lenders, Inc.* (S.D.Cal. 2009) 639 F.Supp.2d 1159, 1168.) Thus, plaintiffs failed to allege an adverse claim to their title as required by Code of Civil Procedure section 761.020, subdivision (c). (*Ortiz v. Accredited Home Lenders, supra*, 639 F.Supp.2d at p. 1168.) Accordingly, we find the superior court properly sustained defendants' demurrer to the quiet title cause of action.

5. *Lis Pendens*

"A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice.' [Citation.] A lis pendens may be filed by any party in an action who asserts

a ‘real property claim.’ (Code Civ. Proc., § 405.20.) [Code of Civil Procedure s]ection 405.4 defines a “‘Real property claim’” as ‘the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property’ ‘If the pleading filed by the claimant does not properly plead a real property claim, the lis pendens must be expunged upon motion under CCP 405.31.’ [Citation.]” (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 647, fn. omitted.) A lis pendens may be expunged when the complaint does not present a real property claim *or* the claimant fails to establish the probable validity of the real estate claim by a preponderance of the evidence. (*Ibid.* and fn. 2.)

The superior court expunged plaintiffs’ lis pendens in part because plaintiffs failed to establish the probable validity of a valid real property claim. (Code of Civ. Proc., § 405.3.) We agree. The nonjudicial foreclosure procedures were complied with after plaintiffs’ default on the loan. Therefore, even assuming plaintiffs’ complaint alleged a real property claim — an issue we do not address — plaintiffs failed to establish the probable validity of such a claim.

6. Plaintiffs Have Not Shown the Failures of the Complaint Can Be Cured.

Plaintiffs have argued the trial court erred in sustaining defendants’ demurrer, but have not addressed how the complaint could be amended to cure the perceived defects. Plaintiffs have thus forfeited any argument to the effect that the court’s failure to grant them leave to amend was error. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.)

7. Conclusion

We conclude the trial court did not err in sustaining defendants’ demurrer to each cause of action without leave to amend. Neither did the court err in expunging the lis pendens.

III

DISPOSITION

The judgment is affirmed. Defendants shall receive their costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.